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# IN THE
# SUPREME COURT OF THE UNITED STATES
October Term, 1979

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No. 79—569

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EDDIE LEE WEATHERSBY,
*Petitioner,*
v.
STATE OF CALIFORNIA,
*Respondent.*

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## PETITIONER'S REPLY BRIEF

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# TOPICAL INDEX


| | Page |
|---|---|
| PETITIONER'S REPLY BRIEF | 1 |
| I Petitioner's Statement of the Case is Supported by the Record | 1 |
| II Intervening Matter Not Available at the Time of Petitioner's Last Filing Underscores the Need for Guidance from this Court | 7 |
| CONCLUSION | 10 |

# TABLE OF AUTHORITIES CITED

## CASES


*Page*

*Commonwealth* v. *Soares*, _____ Mass. _____, 1979 Mass.Adv.Sh. 593, 387 N.E.2d 499 (Mar. 8, 1979) ..... 7, 9
*Duren* v. *Missouri*, _____ U.S. _____ [58 L.Ed.2d 579] (1979) ..... 2
*Estelle* v. *Williams*, 425 U.S. 501 (1976) ..... 3
*Kelly* v. *Stone*, 514 F.2d 18 (9th Cir. 1975) ..... 4
*McFarlane* v. *Smith*, _____F.2d_____[26 Cr.L. 2208] (4th Cir. Oct. 29, 1979) ..... 4
*People* v. *Bain*, 5 Cal.3d 839 (1971) ..... 4
*People* v. *Johnson*, 77 Cal.App.3d 866 (1978) ..... 4
*People* v. *Lucero*, 99 Cal.App.3d_____(2 Crim. No. 34938 Nov. 26, 1979) ..... 6, 7, 8
*People* v. *Wheeler*, 22 Cal.3d 258 (1978) ..... 2, 7, 8, 9
*Strauder* v. *West Virginia*, 100 U.S. 303 (1880) ..... 2
*Swain* v. *Alabama*, 380 U.S. 202 (1965) ..... 8, 9
*Taylor* v. *Louisiana*, 419 U.S. 522 (1974) ..... 2
*United States ex rel. Haynes* v. *McKendrick*, 481 F.2d 152 (2d Cir. 1973) ..... 4
*United States* v. *Danzey*, 476 F.Supp. 1065 (E.D.N.Y. Oct. 3, 1979) ..... 8


## CONSTITUTIONAL PROVISIONS


California Constitution:
Article I, section 16 ..... 7
United States Constitution:
Sixth Amendment ..... 6, 7, 8, 9, 10
Fourteenth Amendment ..... 6, 7, 8


## ARTICLES


Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 Harv. L. Rev. 1770 (1979) ..... 9

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# PETITIONER'S REPLY BRIEF

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Petitioner hereby replies to respondent's brief in opposition and respectfully calls to the Court's attention intervening matter not available at the time of his last filing.

## I. Petitioner's Statement of the Case is Supported by the Record.

By insinuating that petitioner has misstated the facts, the brief in opposition attempts to divert the Court's attention from the substantial legal issues raised by this case. The errors assigned by the petition are so fundamental that their existence must be prejudicial *per se,* requiring reversal of a criminal conviction without re-

gard to the quantum of evidence of guilt.[1] Nevertheless, petitioner stands by his characterization of the record.

This *was* a close case. The jury deliberated more than 24 hours over a period of four days before returning petitioner's guilty verdict (RT 3290–3317).[2] On the second day of deliberations, one juror inquired why there was no form for a hung jury (RT 3305), and on the fourth day, just 29 minutes after petitioner's verdict was returned, the trial judge gave the *Allen* instruction for deadlocked juries which formed the basis of the reversal of codefendant Browning's subsequent conviction (RT 3322–3324). And these were the deliberations of an all-white jury from which sixteen black people had been excluded by prosecution peremptory challenges (CT 135; JST 832–833).

The prosecution's case *was* weak and suspect. Virtually all prosecution "eyewitnesses" had received promises of leniency, dismissals of pending charges, or other benefits in exchange for their testimony. (*See* RT 56, 68, 99, 638, 663–664, 667, 872–883 (witness Hackney); RT 93, 1470–1473, 1573–1577 (witness Guidry); RT 489–492 (witness Terry); RT 956–957, 1014–1015, 1091–1092 (witness Bell); RT 1368 (witness Anjell); RT 1954, 1957, 1971 (witness Pugh)). Moreover, the credibility of the testimony of each was undermined by significant inconsis-

[1] *E.g., Duren* v. *Missouri,* ___ U.S. ___, ___ [58 L.Ed.2d 579, 589–590, 589 n.26] (1979); *Taylor* v. *Louisiana,* 419 U.S. 522, 528 (1974); *Strauder* v. *West Virginia,* 100 U.S. 303, 309–312 (1880); *People* v *Wheeler,* 22 Cal.3d 258, 283 (1978).

[2] "RT" refers to Reporter's Transcript on Appeal; "CT" refers to Clerk's Transcript on Appeal; "JST" refers to the Augmented Reporter's Transcript of the Jury Selection Proceedings.



tencies or impeachment.[3] Under the circumstances, petitioner's assertion that the prosecution's case was weak and suspect is unremarkable and supported by the record.

While some of the racially volatile matter before the jury was concededly brought up by counsel for petitioner's codefendants (*e.g.,* references to Donald DeFreeze and the Black Panther Party were injected into the trial by counsel for codefendant Tucker (RT 2639)), Anderson *did* make many references to the Black Guerrilla Family ("BGF");[4] the 1974 uncharged San Quentin

[3] For example, witness Terry seemingly recanted his testimony on the witness stand, *i.e.,* he apologized for testifying on behalf of the prosecution and stated he knew of nothing the defendants had done wrong (RT 495–496); he also indicated he had been threatened with a conspiracy prosecution if he didn't cooperate (RT 489). In their initial statements to police, witnesses Hackney and Davis had failed to mention petitioner's name in connection with the Nelson killing (RT 1122, 2401). Witness Guidry, who named many participants in a supposed "death council" meeting occurring shortly before the killing, failed to name petitioner (RT 1580, 1591). Witness Pugh's testimony that petitioner had admitted participation in the "sticking" (RT 1920) was contradicted by Pugh's earlier statement suggesting that Hackney, and not petitioner, had done the "sticking" (RT 1993(i)). Pugh's claim that petitioner had threatened him (RT 2000–2001) was undermined by the testimony of witness Altizer who stated that he had written a death threat letter to Pugh at Pugh's request dictated by Pugh (RT 2194) and that Pugh had never suggested he was actually threatened by anyone (RT 2196). Pugh's taped interview indicated no threat from petitioner (RT 2027). Witness Stevenson testified that Pugh had stated that all he had to do was give some information about Browning—anything that would convict him—and he (Pugh) would be cut loose (RT 2208–2209).

[4] Such evidence, most of which was objected to as hearsay, was contained largely in the testimony of prosecution witness Guidry, Bell, Anjell and Pugh.

murder of William Cross;[5] the relationship between George Jackson, the BGF, and the Marin County Courthouse Shootout (RT 2376); the Black Muslim religious sect and the Zebra Killers of San Francisco (RT 2278, 2282, 2285, 2314–2318, 2828, 2830). The general atmosphere of fear and passion was enhanced by petitioner's being brought before the jury on one occasion in jailhouse whites, *see Estelle* v. *Williams,* 425 U.S. 501, 512–513 (1976), by the heavy courtroom security (RT 392–394, 2266, 2324), and by the admission of the autopsy photographs of Nelson's body (RT 588–592). Moreover, whatever the source of the racially volatile matter, its mere presence makes the exclusion of black people from petitioner's jury more egregious and the integrity of the jury's ultimate verdict more suspect.[6] In sum, while we may never know with certainty Anderson's true motives for so exercising his challenges, the speculation of Browning's trial counsel cannot be ruled out:

[5] The prosecution was permitted to go into this evidence to show a characteristic method, plan, or scheme on the part of co-defendant Browning (RT 1523, 1564). It had been stipulated that petitioner and co-defendants Tucker and Wyatt had *never* been in state prison, a jail term being the most severe prior sentence any of them had received (RT 2351, 2455, 2460).

[6] The injection of race as an issue at trial has often been the basis for the reversal of criminal convictions. *E.g., McFarlane* v. *Smith,* ___ F.2d ___ [26 Cr.L. 2208] (4th Cir. Oct. 29, 1979); *Kelly* v. *Stone,* 514 F.2d 18, 19 (9th Cir. 1975); *United States ex rel. Haynes* v. *McKendrick,* 481 F.2d 152, 157 (2d Cir. 1973); *People* v. *Bain,* 5 Cal.3d 839, 849 (1971). *See also People* v. *Johnson,* 77 Cal.App.3d 866, 873 (1978). Where all black prospective jurors have been excluded, the error is all the more unpalatable.



> "All right. The issue is Mr. Anderson's systematic exclusion. I will suggest to the Court that the reason for the systematic exclusion is that Mr. Anderson wants to make in his opening statement suggestions regarding the Black Guerrilla Family which will inflame an all-white jury, which black jurors could clearly see had no relevance to this case. And that is his real motive for excluding all the blacks from this case, because he intends to inflame all the whites which he has kept on the jury." (JST 900–901).

While petitioner agrees that the so-called "winking" behavior (JST 837) does not conclusively establish racial bias (Opp., p.5), that interpretation is consistent with the pattern of personal animosity and bias against the defendants exhibited throughout the trial by Anderson.[7] Whatever the significance of Anderson's behavior, it is hard to believe that in a case in which the prosecutor's animosity toward the defendant's was so visible throughout, his exercise of peremptory challenges *coincidentally* resulted in the defendant's experiencing the sting of the exclusion from the jury of sixteen members of their race.

Trial counsel *did* state that Anderson's attempt to justify the exclusion of blacks was a clear admission of systematic exclusion based on group bias (JST 898). Counsel's precise words were as follows:

[7] For example, during an early trial recess, Anderson was heard to say "Fuck you" to codefendant Browning (RT 1562); the court admonished Anderson not to speak to Browning in the future (RT 1563). During a subsequent recess, Anderson was heard saying to one of the defendants, "You come over here, you punk, and I'll drop you quick, you motherfucker." Browning's counsel merely stated, "The judge has ordered you not to speak to the defendants." (TR 2264).

"Frankly, Your Honor, my interpretation of what I just heard Mr. Anderson say is a clear admission that he systematically excluded blacks. Look, I have tried cases also, and I know full well that in choosing a jury you often go by gut instinct, and when Mr. Anderson has a clear gut instinct against men with beards or people from Berkeley, however much I may not like that, I have no quarrel with it because it is not a systematic exclusion prohibited by the United States Constitution. But when his gut instinct is that no black juror should sit on this case, for whatever reason, that is systematic exclusion prohibited by the United States Constitution in cases decided by the United States Supreme Court. . .

"Mr. Mintz made the argument very well yesterday about the last time he saw such a systematic exclusion of black jurors. I have tried a number of cases in this county for the last four years, not a very long time, but I have never seen such a blatent exclusion of black jurors. And Mr. Anderson has just confirmed what we have been saying. I don't know what else we could offer to this Court to prove systematic exclusion. And the only choice is simply that Mr. Anderson clearly has the right, if that is the ruling, to deny these defendants the right to have black jurors decide the case against them" (JST 898–899).

At the bottom line is one immutable fact which respondent cannot avoid: all sixteen black prospective jurors not challenged for cause were excluded by Anderson's exercise of peremptory challenges, resulting in petitioner's trial and conviction by an all-white jury. This record is more than ample to raise a *prima facie* case of violation of the Sixth and Fourteenth Amendments.



At the time the jury was selected, however, no remedy existed in California[8] or elsewhere[9] to either litigate or redress such violations. The trial court thus had neither an authorized procedure for determining whether such a violation existed nor an authorized remedy to redress it. This Court should fashion a procedure and remedy in order to provide badly needed guidance to courts and litigants alike.

**II. Intervening Matter Not Available at the Time of Petitioner's Last Filing Underscores the Need for Guidance from this Court.**

The recent reported decision in *People* v. *Lucero,* 99 Cal.App.3d ____ (2 Crim. No. 34938 Nov. 26, 1979), bears directly on the issues raised by the petition. There the California Court of Appeal, Second Appellate District, held that "the prosecutor's exercise of peremptory challenges to exclude all[10] Spanish-speaking prospective members from the jury constituted a violation of article I, section 16, of the California Constitution, and, in addition, constituted a violation of the Sixth Amendment to the United States Constitution." 99 Cal.App.3d at ____, Multilith Opinion at ____ (footnote added).

Justice Bernard Jefferson wrote in part as follows:

"Although the [*People* v.] *Wheeler* [22 Cal.3d 258 (1978)] court placed its holding strictly upon California state constitutional grounds, it recognized that such a holding is also required by the Sixth Amendment to the federal constitution . . .

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[8] *See People* v. *Wheeler,* 22 Cal.3d 258 (1978).

[9] *See Commonwealth* v. *Soares,* ____ Mass. ____, 1979 Mass.Adv.Sh. 593, 387 N.E.2d 499 (Mar. 8, 1979).

[10] "[E]ight or nine" such prospective jurors were so excluded. *Lucero, supra,* 99 Cal.App.3d at ____, Multilith Opinion at ____.

"The reason the *Wheeler* court placed its decision upon California state constitutional grounds rather than upon federal constitutional grounds related to the question of whether 'this pernicious practice'—of using peremptory challenges to exclude a well-defined segment of the community from the jury—had to be considered as constitutionally viable by reason of the case of *Swain* v. *Alabama* (1965) 380 U.S. 202. . . .

"We do not consider that *Swain* is either compelling or persuasive in terms of requiring a holding by us that the exercise of peremptory challenges in the case at bench did not constitute a violation of the defendant's right to a fair jury trial guaranteed by the Sixth Amendment to the United States Constitution. The *Swain* decision is not controlling because it adjudicated the issue involved in terms of whether the prosecutor's practice violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. The *Swain* court did not consider at all whether such a practice of the prosecution constituted a violation of a defendant's right to an impartial jury guaranteed by the Sixth Amendment to the United States Constitution. Even though it is obvious that *Swain* does not compel a contrary holding to that reached by us in the case at bench, we do not consider *Swain* to be persuasive with respect to the Sixth Amendment issue."

*Lucero, supra,* 99 Cal.App.3d at ____, Multilith Opinion at ____ (footnotes omitted).

*Lucero* stands in direct conflict with the unpublished decision of the Court of Appeal in this case.

The recent decision in *United States* v. *Danzey,* 476 F.Supp. 1065 (E.D.N.Y. Oct. 3, 1979), is to the contrary.



There the District Court found that the prosecutor's exercise of peremptory challenges to exclude black prospective jurors did not violate the black defendant's right to due process of law under the Fifth Amendment or his right to an impartial jury under the Sixth Amendment. *Id.*, at 1067. The prosecutor had stated on the record that his sole basis for excluding black jurors was racial—*i.e.*, he said: "I make it a practice to attempt to exclude as best I can all jurors so that [*sic*] to exclude jurors of the same ethnic background as the defendant . . . I do that as a matter of course, no matter who the defendant is or whatever his ethnic background is." *Id.*, at 1066. The court concluded that the jury so selected was not unrepresentative, in part because "one black was selected for the jury after the prosecutor had exhausted his challenges." *Id.*, at 1067. It also concluded that "[s]o long as the *Swain* decision remains the law, the act of peremptorily challenging blacks is not impermissible." *Ibid.*

*See also* Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge,* 92 Harv. L.Rev. 1770 (1979), criticizing *Swain,* commending the decisions in *Wheeler* and *Soares,* but questioning whether the fair cross-section rule is the appropriate Sixth Amendment rationale on which to predicate relief.

## CONCLUSION

Petitioner respectfully submits that the writ should issue.

Dated: December 21, 1979

Respectfully submitted,

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